IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6543 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE K.S.JHAVERI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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SAIYAD ASPAK ALI SHAUKAT ALI

Versus

DIRECTOR OF MUNICIPALITIES

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Appearance:

1. Special Civil Application No. 6543 of 2004

MR HM PARIKH for Petitioner No. 1

MR LB DABHI A.G.P. for Respondent No. 1-2

RULE SERVED for Respondent No. 1,3

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CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 18/12/2004

ORAL JUDGEMENT

1. The petitioner has by way of this petition challenged the order dated 31st March, 2004 passed by the

Collector at annexure-D to the petition, which was confirmed by respondent no. 1, Director of Municipalities vide order dated 11th/18th May, 2004 in Appeal No.24/2004.

2. The short facts of the case are that the petitioner is a duly elected councillor of the respondent Municipality. It is the case of the petitioner that during the previous term as councillor, a complaint being C.R. No. I-85/2000 was registered for the commission of offences punishable under Sections 323, 342, 504, 506 (2) and 114 of the IPC. The petitioner contended that thereafter proceedings under Section 37 (1) of the Gujarat Municipalities Act, 1963 ["the Act" for short] were initiated and vide order dated 17th January, 2001, the Director of Municipalities respondent no. 1 herein, disqualified the petitioner as councillor of the respondent Municipality.

2.1. The petitioner was thereafter again elected as a councillor, but due to some political rivalry, respondent no. 3 made an application to the Collector, contending that in view of the provisions of Section 11 (2) read with Section 37 of the Act, the petitioner should be disqualified and removed from the post of councillor. Pursuant to the said application, the Collector issued showcause notice dated 4th March, 2004 to the petitioner as to why he should not be removed from the post of Councillor. The petitioner replied to the said showcause notice vide his reply dated 29th March, 2004. The Collector, Mehsana, vide order dated 31st March, 2004 disqualified the petitioner from the post of councillor for a term of 4 years i.e. from the date of the order passed by respondent no. 1 herein.

2.2. Being aggrieved by the aforesaid order, the petitioner preferred an Appeal being Appeal No. 24/2004, before respondent no.1. Respondent no. 1 vide order dated 11th/18th May, 2004 dismissed the appeal and confirmed the order dated 31st March, 2004 passed by the Collector. Hence, this petition.

3. Mr.Parikh learned advocate for the petitioner has contended that the Collector has wrongly exercised the powers under Section 38 of the Act, inasmuch as the alleged offences were for the previous term. Apart from that even if it is admitted that if any disqualification is there, then also that was not the ground in the notice. He contended that Section 38 of the Act provides that an elected member becomes subject to any disqualification, but it does not relate to any past

disqualification. In the circumstances, if at all the petitioner's nomination or election was required to be challenged on the ground of disqualification, it was required to be challenged by way of an election petition and power under Section 38 of the Act cannot be utilized by the respondent No. 2 Collector for setting aside the election of a councillor on the ground that he was disqualified to contest the election. He further contended that the order passed by the Collector has travelled beyond the order of the Director of Municipalities dated 17th January, 2004 inasmuch as the Director has never specified disqualification period and, therefore, stated to be removed as a member for that term. He further submitted that since the Municipality was superseded, the term can be said to be over.

3.1. Mr. Parikh further contended that at the most the case against the petitioner could have arisen at the time of his nomination but not after having elected, therefore, these proceedings are misconceived of fact and law.

3.2. Mr. Parikh in support of his case has relied upon the decision of the Apex Court in the case of Election Commission v. Venkata Rao reported in A.I.R. 1953 S.C. p.210 and more particularly para 15, which reads as under :-

"15. It was said that on the view that Arts. 190 (3) and 192 (1) deal with disqualification incurred after election as a member, there would be no way of unseating a member who became subject to a disqualification after his nomination and before his election, for such a disqualification is no ground for challenging the election by an election petition under Article 329 of the Constitution of India read with S. 100 of the Representation of the People Act, 1951. If this is an anomaly, it arises out of a lacuna in the latter enactment, which could easily have provided as an argument against the respondent's construction of the constitutional provisions. On the other hand, the Attorney-General's contention might, if accepted, lead to conflicting decisions by the Governor dealing with a reference under Art. 192 and by the Election Tribunal inquiring into an election

petition under S. 100 of the Parliamentary statue referred to above."

3.3. He has next relied upon the decision of this Court in the case of Hajibhai Jamadibhai Saiyed v. State Election Commission & Ors., reported in 2002 (1) G.L.H. p.57, and more particularly para 18, which reads as under:-

"18. The Court, therefore, finds substance in the argument that the order of disqualification passed under Section 38 by itself does not provide for any indefinite embargo on the former councillor's contesting elections after expiry of the term during which he is disqualified. Even on the facts the order dated 14-6-1999 of the Collector under Section 38 of the Act clearly states that respondent no. 4 herein was disqualified from "the present Board" i.e. the Board which was then existing on 14-6-1999. Even so, while holding that the petitioners' disqualification from Councillorship pursuant to the Collector's order dated 14-6-1999 under Section 38 of the Act did not disqualify respondent no. 4 from contesting elections as Councillor of the Municipality for the term after 10-1-2000, respondent no. 4 was still required to clear the hurdle under Section 11 of the Act. Clause (c) of subsection (2) of Section 11 provides as under :-

11 (2) No person.
(a) xxx xxx xxx
(b) xxx xxx xxx
(c) who, save as hereinafter provided, has directly or indirectly, by himself or his partner any share or interest in any work done by order of a Municipality or in any contract or employment with or under or by or on behalf of a municipality or
(d) xxx xxx xxx may be councillor of such municipality."

While a decision is required to be rendered by the Collector under Section

> 38 for deciding whether any elected councillor (during the term for which he had been elected) has been disabled from continuing to be a councillor on account of any disqualification specified in Section 11, no such decision of the Collector is required when the case of a candidate is to be considered under the provisions of Section 11 for deciding whether he is disqualified from contesting for the office of councillor. It is for the Election Officer to decide whether a candidate has incurred any of the disqualification as enumerated in Section 11 of the Act. In the instant case, all that the Election Officer appears to have done is to refer to the disqualification order dated 14-6-1999 and held that respondent no. 4 was disqualified under the provisions of Section 38 read with Section 11 of the Act and that disqualification continued on the date of scrutiny of the nomination forms. That part of the decision of the Election Officer, insofar as the Election Officer relied solely on the order dated 14-6-1999 disabling respondent no. 4 from continuing as a councillor for the term between 14-6-1999 to 10-1-2000 must be treated as illegal. The question still remains whether respondent no. 4 was disqualified from contesting as a councillor in view of the bar pleaded under subsection (2) (c) of Section 11 of the Act."

3.4. Mr. Parikh therefore, submitted that in view of the aforesaid decisions, the order passed by the Collector and the Director of Municipalities are required to be quashed and set aside.

3.5. Mr. Dabhi learned A.G.P. for the respondents contended that the order passed by both the authorities are just and proper inasmuch as the four year period as contemplated under Section 11 (1) (ii) is not over and, therefore, the Collector is empowered to pass order Section 38 of the Act.

4. I have heard the learned advocates for the respective parties and have perused the relevant record. Section 38 of the Act is very clear because the words

used are "during the term" and "becomes". Therefore, it is clear that the Collector has no authority to initiate proceedings under Section 38 of the Act for the alleged misconduct of petitioner for the previous term once the petitioner is elected by fresh mandate. Even otherwise, in the opinion of the legislature, before initiating proceedings under Section 38 of the Act, the Collector ought to have verified the language used in Section 38 of the Act. Apart from that, the provisions of Section 11 (1) (ii) of the Act, could have been invoked for rejecting his nomination, but it is not open for the Collector to raise this contention after the petitioner having been elected, because the intention of the legislature under Section 38 is during the term for which he is elected and any disqualification under Section 11 of the Act is during that term only. Thus, in my opinion, the contention raised by Mr. Parikh is required to be accepted more particularly, in view of the ratio laid down by the Apex Court in the case of Election Commission v. Venkata Rao (supra). Moreover, the order dated 17th January, 2004 passed by the Director of Municipalities has remained only for that term and not for the subsequent period and, therefore, the Collector has committed an error in passing the order for the period of four years which was not there in the matter. Lastly, Mr. Parikh contended that since after the order dated 17th January, 2004, there was supersession of Nagarpalika and, therefore, he has not challenged the said order.

5. In the premises aforesaid, the petition is allowed. The orders passed by the Collector dated 31st March, 2004 and dated 11th/18th May, 2004 passed by the Director of Municipalities, are quashed and set aside and the petitioner shall be allowed to continue as councillor for the remaining term. Rule is made absolute to the aforesaid extent with no order as to costs.

[K.S. JHAVERI, J.]

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